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No. 04-

IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court previously held that police officers violated petitioner's Sixth Amendment right to counsel when the officers deliberately elicited an incriminating statement from petitioner, who at the time was under indictment and was entitled to the assistance of counsel in his defense. *See Fellers* v. *United States*, 540 U.S. 519, 524-525 (2004). Within only one half-hour of the Sixth Amendment violation identified by this Court, the same officers took petitioner to jail, administered *Miranda* warnings, and again confronted petitioner outside the presence of counsel, obtaining a related incriminating statement. The court of appeals ruled that petitioners' second statement was properly admitted at trial under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), without regard to whether the second statement was derived from the prior Sixth Amendment violation.

The questions presented are:

1. Whether the court of appeals erred in declining to analyze the admissibility of the second incriminating statement under the traditional derivative-evidence rule and instead holding that the statement was properly admitted at petitioner's trial under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). (This Court previously granted certiorari to decide this question, but did not resolve it.)

2. Whether the court of appeals erred in holding, in the alternative, that the admission of the second incriminating statement was harmless error, based on the sufficiency of other evidence purportedly supporting petitioner's conviction.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner John J. Fellers respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 397 F.3d 1090. The opinion of this Court (App. 17a-22a) is reported at 540 U.S. 519. The first opinion of the court of appeals (App. 23a-30a), which was reversed and remanded by this Court, is reported at 285 F.3d 721. The order of the district court (App. 31a-36a), the order of the magistrate judge (App. 37a-38a), and the transcript of the oral ruling of the magistrate judge on petitioner's motion to suppress (App. 39a-43a) are not reported.

JURISDICTION

The opinion of the court of appeals was issued on February 15, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This Court previously granted a petition for certiorari in this case to decide two questions: (1) whether police officers violated petitioner's Sixth Amendment right to the assistance of counsel by deliberately eliciting a post-indictment, incriminating statement from him in the absence of counsel, and (2) if so, whether a second, related statement elicited from petitioner approximately one half-hour later, without any intervening consultation with counsel, but after the administration of warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should have been suppressed as the fruit of the earlier Sixth Amendment violation. After briefing and oral argument on both questions, this Court unanimously agreed with petitioner on the first question, but remanded the case for the court of appeals to decide "in the first instance" whether petitioner's second statement was properly admitted under the rationale of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). *Elstad*, which involved statements taken from a suspect who was not under indictment and was therefore not covered by the Sixth Amendment's Counsel Clause, held that the failure to give *Miranda* warnings to a suspect, when not amounting to a violation of the Constitution itself, does not require the suppression of a statement obtained after a subsequent provision of full *Miranda* warnings and the suspect's knowing and voluntary waiver of his *Miranda* rights. *See id.* at 303-309.

The court of appeals has now decided the question that this Court requested it to consider, reaching the same result that it reached prior to this Court's certiorari grant. As it

had previously, the court of appeals held that the admissibility of petitioner's second statement should be analyzed under *Elstad* rather than under the derivative-evidence rule (*i.e.*, the fruits of the poisonous tree doctrine) normally applicable in cases of constitutional violations. With the court of appeals' ruling, the question whether a confession derived from a Sixth Amendment violation can nonetheless be admitted under *Elstad* is now squarely presented for this Court's consideration. On remand, the court of appeals also applied a harmless-error standard that is flatly inconsistent with this Court's precedents. Petitioner respectfully seeks this Court's review on both issues.

1. On February 23, 2000, a federal grand jury returned an indictment charging petitioner with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 846. One day later, Deputy Sheriff Jeff Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael Garnett of the Lincoln Police Department went to petitioner's home in Lincoln, Nebraska to arrest him. App. 17a-18a. While in petitioner's home, the police officers deliberately elicited incriminating information from petitioner, "inform[ing] him that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain charged co-conspirators"—Kathi Kuenning, Patrick Sardeson, Thomas Geffs, and Mark Farfalla. App. 21a. Petitioner agreed to talk to the officers and acknowledged that he had used methamphetamine at an earlier time in his life, when he had associated with the four named persons. App. 18a.

The officers then transported petitioner directly to the Lancaster County jail, a trip that lasted approximately twenty minutes, and placed petitioner in an interrogation room. *See* Joint Appendix, *Fellers* v. *United States*, No. 02-6320 (*Fellers* JA), at 21, 23-24, 49-50 (transcript of suppression hearing). After receiving *Miranda* warnings, petitioner agreed to speak to the officers. *Id.* at 24-27. Bliemeister then questioned petitioner about the same four associates

discussed during the immediately preceding encounter at petitioner's home. *Id.* at 29-34, 51-52, 89. Bliemeister acknowledged that in conducting the jailhouse interrogation, he employed specific techniques for which he had received training. In particular, Bliemeister attempted to elicit certain admissions from petitioner and then progressively sought increasingly more detailed answers about those admissions. *See* Trial Transcript (TT) 91-92, 177.

Armed with petitioner's prior acknowledgement that he had associated with the four individuals, Bliemeister initially questioned petitioner about "his involvement with ... Geffs." *Fellers* JA at 29. Having already admitted, in the previous encounter at his home, that he had associated with Geffs, petitioner again acknowledged the same. *Id.* In response to additional questioning by Bliemeister, however, petitioner denied that he ever had obtained methamphetamine from Geffs. *Id.* Bliemeister then moved his questioning to Sardeson, Kuenning, and Farfalla, similarly addressing petitioner's relationship with each person one at a time. *Id.* at 29-34. In each case, the officer asked petitioner whether he knew the person in question, even though petitioner had admitted his association with them just one half-hour earlier. *Id.* at 29-34, 51-52, 89. As this Court recognized, "petitioner then reiterated the inculpatory statements he had made earlier," acknowledging his association with each co-conspirator. App. 18a.

After reestablishing the fact of petitioner's association with Sardeson, Kuenning and Farfalla, Bliemeister asked additional questions seeking details of petitioner's relationship with each. In response to that interrogation, petitioner confessed that he had obtained methamphetamine from Kuenning and Sardeson, lent money to Kuenning, shared methamphetamine with Sardeson, and used methamphetamine with Farfalla. *Fellers* JA at 29-34, 37. Petitioner denied, however, selling methamphetamine. *Id.* at 37-38. Bliemeister also asked petitioner about his involvement with a few persons not broached previously at petitioner's home. *Id.* at 34-35, 37-38, 52. Finally, Detective Garnett asked pe-

titioner questions about his methamphetamine use. *Id.* at 35-36, 79. Petitioner repeated his earlier admission, made during the encounter at his home, that he had used methamphetamine. In response to further questioning, petitioner also discussed various details of that use. *Id.* at 33, 35-36.

2. a. Before trial, petitioner moved to suppress the statements he had made at his home and the jail. The magistrate judge held a hearing at which Bliemeister and Garnett testified. Based on the testimony, the magistrate judge found that the officers' statements to petitioner at his home were "designed to elicit a response," that only one half-hour elapsed between the time the officers left petitioner's home and the time they commenced interrogation at the jailhouse, and that, notwithstanding the administration of *Miranda* warnings at the jail, petitioner's jailhouse statement was tainted by the prior unlawful encounter at his home. App. 39a-42a. The magistrate judge recommended suppression of petitioner's statement at his home as well as his subsequent jailhouse statement to the extent that the latter concerned the persons discussed previously at petitioner's home (namely, Kuenning, Sardeson, Geffs, and Farfalla). App. 42a-43a.

The district court accepted the recommendation to suppress petitioner's statement at his home, but rejected the recommendation to suppress petitioner's jailhouse statement. App. 32a, 35a. According to the district court, petitioner "made a knowing, intelligent, and voluntary waiver of his *Miranda* rights" before making his jailhouse statement. App. 35a. Based on that fact, but without making any additional findings regarding the extent of any attenuation of the taint from petitioner's first statement, the district court found the jailhouse statement admissible under *Elstad*. App. 33a-35a.

b. Bliemeister testified at petitioner's trial, recounting petitioner's jailhouse statement for the jury. *See* TT 52-182. Apart from the officer's testimony, the government's case consisted entirely of testimony from witnesses with severe credibility problems. Each of the witnesses was involved in

some manner in the alleged conspiracy, and each also had numerous prior felony convictions (in addition to their recent convictions arising out of this alleged conspiracy). *See* TT 259 (Kuenning: three other prior convictions); 336 (Geffs: six); 394-396 (Sardeson: three); 430-431 (Abbott: five); 470 (Messersmith: two); 486 (Lawrence: two); 523-524 (Cotton: eight). Three of the government's witnesses, including its two primary witnesses (Kuenning and Cotton), had been convicted of forgery and other crimes that involved dishonesty and therefore cast doubt on their veracity. *See* TT 189 (Kuenning: forgery); 430, 437-438 (Abbott: forgery, two for false reporting to police officers); 523-524 (Cotton: theft by deception, three for forgery). All of the witnesses testified that they were long-time drug addicts. *See* TT 263-264, 344, 367-368, 441, 475, 512, 647-649. One of the government's two primary witnesses, Kuenning, testified that the government's other primary witness, Cotton, had a reputation for being dishonest and a liar. *See* TT 672. Kuenning also disputed the truth of important parts of Cotton's testimony, leading the government to take the unusual step of impeaching Kuenning, on whom its case was built, with her admission that, due to drug addiction, her "memory is worthless." TT 271, 681.

Moreover, all of the witnesses admitted that they were testifying pursuant to cooperative plea agreements. *See* TT 184, 261-262 (Kuenning); 303 (Geffs); 362 (Sardeson); 409 (Abbott); 446 (Messersmith); 484 (Lawrence); 519 (Cotton). At the time of their testimony, six of the seven witnesses were serving prison sentences for their recent controlled-substances convictions (*see* TT 183, 362, 409, 446, 484, 519), and the seventh witness (Geffs) avoided prison by entering into his plea agreement and cooperating with the government. *See* TT 303-307, 345-347. Kuenning, Sardeson, Abbott, Messersmith, and Cotton admitted that they were testifying against petitioner with the hope that, pursuant to their plea agreements, they would be rewarded with reduced sentences. *See* TT 186, 261-262, 365, 402, 434-435, 449-450, 473-474, 521, 594-595. Lawrence testified that he was

cooperating to avoid prosecution in federal court for offenses with longer prison sentences. *See* TT 511.

As a result, and in response to petitioner's repeated challenges to the credibility of the government's witnesses in cross-examination and closing argument, the government placed important reliance on petitioner's jailhouse statement. In its closing argument, after conceding its witnesses' shortcomings (*see* TT 728-729), the government attempted to shore up the testimony of its witnesses by describing several ways in which "[petitioner's] own statements corroborate the testimony that has been presented by the other witnesses who have been brought in for you." TT 734; *see also* TT 704, 732-734. The jury found petitioner guilty of a lesser-included offense involving between 50 and 500 grams of methamphetamine, thereby rejecting the charge of distributing more than 500 grams, for which the government had sought conviction. *See* TT 710, 739.

c. The court of appeals affirmed. The court rejected petitioner's Sixth Amendment challenge in a single sentence, holding that "the officers did not interrogate Fellers at his home." App. 26a. The court further held that because petitioner made his jailhouse statement after having received *Miranda* warnings, that statement was admissible under *Elstad*. App. 25a-26a. Judge Riley concurred. Although he believed the officers did violate petitioner's Sixth Amendment right to the assistance of counsel, he agreed that the jailhouse statement was admissible under the rationale of *Elstad*. App. 30a.

d. Petitioner sought review in this Court, arguing that (1) the court of appeals had applied an incorrect legal standard to the question whether his first statement was obtained in violation of the Sixth Amendment, and (2) if his first statement was obtained in violation of the Sixth Amendment, then his second statement also should have been suppressed as it was derived from the initial constitutional violation, and that *Elstad* does not permit the admission of a statement that is derived from a violation of the Sixth Amendment. *See* Pet. for Writ of Certiorari, *Fellers* v.

United States, No. 02-6320. This Court granted review on both questions. *See* 538 U.S. 905 (2003).

This Court reversed and remanded. Finding that the police officers " 'deliberately elicited' information from petitioner" after his indictment and in the absence of counsel, this Court ruled that "the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* [v. *United States*, 377 U.S. 201 (1964)], and its progeny." App. 21a. The Court further held that, given this error, the court of appeals "improperly conducted its 'fruits' analysis under the Fifth Amendment." *Id.* The Court did not resolve the second question on which it had granted certiorari concerning the admissibility of petitioner's second, jailhouse statement. Rather, this Court remanded the case for the court of appeals to decide "in the first instance" "whether the *Elstad* rationale applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards." App. 21a-22a.

3. On remand, the court of appeals again affirmed petitioner's conviction. Addressing the precise question remanded to it by this Court, the court of appeals held that *Elstad* does apply in cases involving Sixth Amendment violations. *See* App. 8a ("[T]he *Elstad* rule applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the Sixth Amendment."); *see generally* App. 3a-10a.

In so holding, the court of appeals rejected petitioner's arguments that *Elstad* is inapplicable to cases in which (1) an actual constitutional violation, rather than a mere *Miranda* violation, is at issue, and (2) a Sixth Amendment, rather than a Fifth Amendment, issue is presented. Respecting the first argument, the court of appeals recognized that this Court has held that the traditional derivative-evidence rule applies when government officers violate the Fourth, Fifth, or Sixth Amendment. *See* App. 4a. Indeed,

the court noted that *Elstad* itself states that "constitutional violations mandate application of the fruits doctrine." *Id.* The court of appeals also acknowledged that *Elstad*'s "rejection of the [derivative-evidence] rule in the *Miranda* context was premised on the fact that a violation of *Miranda* was not, by itself, a violation of the Fifth Amendment and on the fact that the protections afforded by the *Miranda* rule sweep more broadly than the Fifth Amendment itself." *Id.*

Nevertheless, the court of appeals ruled that the traditional derivative-evidence rule should not be applied in this case. The court of appeals determined that this Court undercut the original rationale for its *Elstad* ruling when it subsequently decided *Dickerson* v. *United States*, 530 U.S. 428 (2000). In the court of appeals' view, *Dickerson* reinterpreted *Elstad* as resting not on the absence of a constitutional violation but instead "on the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." App. 4a.

The court of appeals also rejected any distinction between the Fifth Amendment context of *Elstad* and the Sixth Amendment context of petitioner's case. Relying on *Patterson* v. *Illinois*, 487 U.S. 285 (1988), a case that did not address any derivative-evidence issues, the court concluded that the applications of the Fifth and Sixth Amendments to pretrial interrogation are sufficiently similar to justify the extension of *Elstad* to cases in which officers violate a defendant's Sixth Amendment rights by deliberately eliciting an uncounseled, post-indictment statement. App. 8a-10a. The court thus held that "[i]n the case of warned confessions that follow unwarned, uncounseled statements, . . . the suspect's knowing, intelligent, and voluntary choice to waive his right to counsel constitutes an intervening act of free will that breaks the causal link between the prior uncounseled statements . . . and the subsequent statements." App. 8a.

Having decided that *Elstad* governs, and having rejected application of the derivative-evidence rule, the court of appeals also applied the test articulated by the plurality in

Missouri v. *Seibert*, 124 S. Ct. 2601, 2612 (2004), for cases involving *Miranda* violations. *See* App. 11a-12a. Under that test, designed to determine the efficacy of *Miranda* warnings in ensuring a suspect's comprehension of his Fifth Amendment right to remain silent after having made an initial unwarned statement, the court held that the officers' conduct had not "vitiate[d] the effectiveness of the *Miranda* warnings given to [petitioner]." App. 11a. The court also found that petitioner's statement could be admitted under the separate test, again designed for cases involving *Miranda* violations, set forth in Justice Kennedy's concurring opinion in *Seibert*. *See* App. 12a.

Finally, the court of appeals determined that any error in admitting petitioner's jailhouse statement was harmless. *See* App. 12a-14a. The court acknowledged that "each of the government witnesses had numerous past convictions, had used illegal drugs extensively for a number of years, and were testifying pursuant to plea bargains in hopes of a reduced sentence." App. 13a. Yet, relying on a decision adjudicating a conceptually distinct sufficiency-of-the-evidence challenge, the court dismissed the relevance of the witnesses' backgrounds here, holding that "their credibility was for the jury to decide." *Id.* (citing *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 935 (8th Cir. 2000)). The court did not inquire whether the admission of petitioner's jailhouse statement contributed to the jury's partial crediting of the government witnesses' testimony, and thus to the resulting verdict. *Cf. Chapman* v. *California*, 386 U.S. 18, 24 (1967) ("the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). Rather, the court of appeals simply excised petitioner's jailhouse confession from the government's case and concluded that the remaining evidence was sufficient to support his conviction. Quoting another sufficiency-of-the-evidence case, the court reasoned that "[a]lthough a reasonable mind could entertain concerns about the reliability and consistency of [the government witnesses'] accounts given the witnesses' plea bargains,

criminal histories, and past drug use, the evidence presented by the government in this case is *sufficient* to prove the [petitioner] conspired to possess methamphetamine with intent to distribute." App. 13a-14a (internal quotation marks omitted, emphasis added) (quoting *United States* v. *Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)).*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT *OREGON* V. *ELSTAD* DOES NOT APPLY TO VIOLATIONS OF THE SIXTH AMENDMENT, AND THAT SUCH CASES ARE INSTEAD GOVERNED BY THE TRADITIONAL DERIVATIVE-EVIDENCE RULE

This Court previously granted certiorari in petitioner's case to review the applicability of *Oregon* v. *Elstad*, 470 U.S. 298 (1985), to the admission of a suspect's statement that was derived from a Sixth Amendment violation. *See* 538 U.S. 905 (2003); Pet. for Writ of Certiorari, *Fellers* v. *United States*, No. 02-6320, at 17-23. Because the court of appeals' earlier decision had erroneously failed to find a Sixth Amendment violation, this Court, after correcting that error, remanded the case for the court of appeals to pass on the *Elstad* question first. The court of appeals has now done so, reaching the same result that this Court originally determined to review.

The court of appeals' decision, applying *Elstad* rather than the traditional derivative-evidence rule, is unprecedented and erroneous. Moreover, the decision poses a distinct danger to the Sixth Amendment right to counsel, for it provides the police with a road map to eviscerate the right of criminal defendants to legal assistance at a point where they are most vulnerable. Accordingly, this Court should grant

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* On a separate issue, the court of appeals held that petitioner was entitled to a new sentencing hearing based on this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). App. 14a-15a. The district court held that hearing on May 2, 2005, reducing petitioner's sentence to a term of 102 months' imprisonment.

review and make clear that *Elstad* does not permit the admission of the fruits of a Sixth Amendment violation.

1. This Court has consistently ruled that evidence obtained by or derived from unconstitutional conduct must be excluded from a defendant's criminal trial. *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471, 484-485 (1963) (Fourth Amendment); *Brown* v. *Illinois*, 422 U.S. 590, 597-600 (1975) (same); *Kastigar* v. *United States*, 406 U.S. 441, 453-454, 461-462 (1972) (Fifth Amendment); *Chavez* v. *Martinez*, 538 U.S. 760, 768-770 (2003) (plurality opinion) (same); *United States* v. *Wade*, 388 U.S. 218, 239-241 (1967) (Sixth Amendment); *Nix* v. *Williams*, 467 U.S. 431, 441-443 (1984) (same). The last two cited decisions confirm that the derivative-evidence rule is fully applicable to the fruits of Sixth Amendment violations. For example, in *Wade*, which involved a violation of the respondent's Sixth Amendment right to the assistance of counsel at a pretrial identification lineup, the Court held that the admissibility of the subsequent courtroom identification was governed by the derivative-evidence rule of *Wong Sun*. *See Wade*, 388 U.S. at 239-241. The Court explained that "[a] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." *Id.* at 240.

Similarly, in *Nix*—which involved a violation of the same "deliberate elicitation" standard of *Massiah* v. *United States*, 377 U.S. 201 (1964), that is at issue here—the Court stated that "the 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment as well as of the Fifth Amendment." *Nix*, 467 U.S. at 442 (citing, *e.g.*, *Wade*, 388 U.S. 218). At issue in *Nix* was whether evidence pertaining to the discovery and condition of a murder victim's body was properly admitted at the defendant's trial, given that the police had discovered the body after deliberately eliciting incriminating statements from the defendant in the absence of counsel. *See id.* at 434. The Court held

that the derivative evidence was properly admitted because the government inevitably would have discovered it. *See id.* at 448-450. That holding confirms the applicability of the derivative-evidence rule in the Sixth Amendment context. Were the rule not applicable, there would have been no need for the Court even to address whether a new inevitable-discovery exception should be recognized.

Just last Term, in another *Elstad*-related case, the plurality in *United States* v. *Patane* confirmed that the traditional derivative-evidence rule governs in cases of Sixth Amendment violations. The *Patane* plurality specifically cited *Nix* as an application of the "fruit of the poisonous tree" doctrine "in the Sixth Amendment context" and noted that the doctrine "applies to illegally obtained evidence and other incriminating evidence derived from it." 124 S. Ct. 2620, 2629 (2004) (internal quotation marks, alterations, and emphasis omitted). The courts of appeals have followed this Court's lead, similarly holding that the derivative-evidence rule governs the admissibility of fruits of Sixth Amendment violations. *See United States* v. *Faulkingham*, 295 F.3d 85, 91, 94 (1st Cir. 2002); *United States* v. *Mitcheltree*, 940 F.2d 1329, 1343 (10th Cir. 1991); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990); *United States* v. *Kimball*, 884 F.2d 1274, 1278 (9th Cir. 1989); *United States* v. *Tedford*, 875 F.2d 446, 450 (5th Cir. 1989).

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court concluded that the traditional derivative-evidence rule should not apply when the only government misconduct at issue was an inadvertent failure to give the full warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See Elstad*, 470 U.S. at 304. The Court held that in those circumstances, a defendant's subsequent confession may be admitted so long as it was preceded by *Miranda* warnings and was knowingly and voluntarily made. *See id.* at 309. This Court has not extended *Elstad* beyond its narrow *Miranda* context, nor has the Court announced any similar exception to the derivative-evidence rule in circumstances where the government has violated a defendant's Sixth Amendment right to the assis-

tance of counsel. And, to petitioner's knowledge, apart from the court of appeals' decision here, no court of appeals has extended *Elstad* to cases of Sixth Amendment violations. The court of appeals' decision in this case thus stands alone.

2. The court of appeals' decision is erroneous in two fundamental respects.

a. *First*, as the court of appeals itself acknowledged, this Court consistently has applied the derivative-evidence rule in cases involving constitutional violations. The Court recognized only a limited exception in *Elstad* due to the *absence* of any constitutional violation in that case. As the Court explained there, "[r]espondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." 470 U.S. at 305. But, "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1. Thus, the Court rejected the respondent's argument there at its very root, concluding that the derivative-evidence rule does not apply with its normal breadth where the primary misconduct violates no constitutional standards itself. *See also id.* at 308 ("Since there was no actual infringement of the suspect's constitutional rights [in *Michigan* v. *Tucker*, 417 U.S. 433 (1974)], the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."). In contrast, the Court noted, official misconduct of constitutional magnitude "traditionally mandate[s] a broad application of the 'fruits' doctrine." 470 U.S. at 306.

The court of appeals acknowledged all of the above, but then refused to follow *Elstad*'s teachings based on the court of appeals' conclusion that *Elstad* should now be reinterpreted in the light of *Dickerson* v. *United States*, 530 U.S. 428 (2000). The court of appeals seized on this Court's statement in *Dickerson* that *Elstad* "refus[ed] to apply the

traditional 'fruits' doctrine developed in Fourth Amendment cases" based on "the fact that unreasonable searches under the Fourth Amendment are different from *unwarned interrogation* under the Fifth Amendment." 530 U.S. at 441 (emphasis added). Nothing in that sentence, however, suggests that this Court has abandoned its previous view in *Elstad* that mere "unwarned interrogation" does not amount to a violation of the Constitution and *for that reason* does not trigger the traditional derivative-evidence rule. Rather, *Dickerson* confirms *Elstad*'s premise—that unwarned interrogation, standing alone, should not "breed[] the same consequences as police infringement of a constitutional right." 470 U.S. at 304.

The court of appeals reached a contrary conclusion here only by ignoring this Court's subsequent cases. Since *Dickerson*, this Court has twice confirmed that an inadvertent *Miranda* violation alone—the illegality at issue in *Elstad*—does not constitute a violation of the Fifth Amendment. In *Chavez* v. *Martinez*, 538 U.S. 760 (2003), the plurality specifically quoted *Elstad* for the proposition that " '[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself,' " *id.* at 770 (plurality) (citation omitted), and Justice Kennedy agreed that a *Miranda* violation does not itself violate the Constitution, *see id.* at 789 (Kennedy, J., concurring in part, dissenting in part). In *Patane*, 124 S. Ct. at 2628, the plurality reiterated that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. So much was evident in many of our pre-*Dickerson* cases, and we have adhered to this view since *Dickerson*." Moreover, the *Patane* plurality opinion confirmed the very point that the court of appeals wrongly believed was undercut by *Dickerson*—that *Elstad*'s refusal to apply the traditional derivative-evidence rule there was premised squarely on the absence of a constitutional violation. *See Patane*, 124 S. Ct. at 2626. Indeed, for purposes of determining the derivative-evidence rule's applicability, the *Patane* plurality contrasted the unwarned

interrogation at issue in *Elstad* with actual violations of the Fourth, Fifth, *and Sixth Amendments*. *See id.* at 2629 (citing *Nix*, 467 U.S. at 441).

The important premise of *Elstad*—that the traditional derivative-evidence rule should not apply when the government misconduct at issue does not violate the Constitution itself—is absent in cases like the present one, where a court finds an actual violation of the Constitution. As this Court confirmed in its earlier decision, the officers violated the Sixth Amendment when they deliberately elicited a post-indictment, uncounseled statement from petitioner at his home. *See* App. 21a. Thus, like the Sixth Amendment violations in *Wade* and *Nix*, the primary illegality here mandates application of the derivative-evidence rule.

b. *Second*, and separately, the court of appeals also wrongly extended *Elstad* beyond its limited Fifth Amendment context. This Court has noted that each derivative-evidence inquiry should reflect "the distinct policies and interests" of the particular constitutional right at issue. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975). The *Elstad* rule for the admission of evidence derived from a *Miranda* violation was designed only to "satisf[y]" "the Fifth Amendment proscription against use of compelled testimony." 470 U.S. at 318. In that limited context, the rule is sensible. When officers elicit an initial voluntary confession from a suspect (even if they fail to comply in all respects with *Miranda*), the subsequent administration of *Miranda* warnings generally ensures that a confession given thereafter is also voluntary, and thereby addresses the central concern of the Fifth Amendment. *See id.* at 310-311. Thus, the Court held in *Elstad* that while an initial failure to administer the *Miranda* warnings warrants a presumption that any confession gained thereby was compelled, administration of the *Miranda* warnings prior to a second confession "ordinarily should suffice to remove the conditions" that warranted the presumption of compulsion with regard to the first confession. *Id.* at 314; *see also Missouri* v. *Seibert*, 124 S. Ct. 2601, 2612 (2004) (plurality) (noting that the *Miranda* warnings in

Elstad were understood to "present[] a genuine choice whether to follow up on the earlier admission").

Compulsion is not the focus of the Sixth Amendment. Rather, the principal purpose of the Sixth Amendment is to ensure that a person formally charged with a criminal offense has access to expert legal assistance at every critical stage of a criminal prosecution, thereby ensuring that he is not unfairly disadvantaged by an imbalance of skill and resources between himself and the prosecution. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 169 (1985); *United States* v. *Ash*, 413 U.S. 300, 309 (1973).

When officers deliberately elicit a post-indictment confession from an uncounseled defendant, subsequent *Miranda* warnings from the same officers are not sufficient alone to ensure that the central concerns of the Sixth Amendment are vindicated, especially when (as in this case) virtually no time has passed since the initial confession was illegally obtained. The warnings by themselves do not afford the defendant " 'the professional legal skill' " necessary to understand the situation into which the government's misconduct has thrust him. *Moulton*, 474 U.S. at 169. They do not inform the defendant, as counsel would, of the legal rules concerning the admissibility of the prior, deliberately elicited statement. Nor do the *Miranda* warnings provide the defendant legal advice regarding the true consequences of making an additional statement in these circumstances. There is accordingly a heightened danger that the defendant will decide to make a second statement based upon a lack of familiarity with his legal rights. In short, while the administration of *Miranda* warnings normally may remove the Fifth Amendment taint from a prior *Miranda* violation by adequately ensuring that a defendant understands he has a choice whether to speak further, *Miranda* warnings do not alleviate the distinct Sixth Amendment taint from the elicitation of a prior uncounseled statement by providing adequate legal advice to a defendant respecting whether he should exercise that choice to speak further under the circumstances.

The court of appeals elided this important distinction through a misplaced reliance on *Patterson* v. *Illinois*, 487 U.S. 285 (1988). This Court held in *Patterson* that a criminal defendant's waiver of his *Miranda* rights, made after a full provision of *Miranda* warnings, will suffice to waive the defendant's Sixth Amendment right to the assistance of counsel during pretrial questioning. *See id.* at 292-297. Accordingly, in such cases, post-waiver questioning ordinarily will not itself violate the Sixth Amendment. The question in this case, however, is not whether the police officers violated petitioner's Sixth Amendment right to counsel when they eventually furnished him with *Miranda* warnings and then interrogated him at the jailhouse. The police had *already* violated the Sixth Amendment, when they questioned petitioner at his home.

Rather, the question in this case is whether petitioner's jailhouse statement should be suppressed as the fruit of that *prior* Sixth Amendment violation at his home. *Patterson* did not announce any test for the admission of such derivative evidence, nor did it address the more specific question whether a *Miranda* warning is sufficient, standing alone, to secure the admissibility of evidence derived from a prior Sixth Amendment violation. Indeed, there was no government misconduct (and more particularly, no Sixth Amendment violation) preceding the waiver in *Patterson*, so the decision lacks the defining element of a derivative-evidence case like petitioner's. *See* 487 U.S. at 287-289. This Court simply had no occasion to establish a standard for admission of derivative evidence in circumstances where officers first unconstitutionally elicit an uncounseled, post-indictment statement.

When such government misconduct has already occurred, there is an important reason to distinguish between the Fifth and Sixth Amendments in analyzing the admissibility of derivative evidence. Counsel serves distinct purposes under the two Amendments when government officers have unlawfully elicited a first incriminating statement. For purposes of the Fifth Amendment, the assistance of counsel can

ensure that a defendant does not wrongly believe that he is *compelled* to speak further to the government. But, as this Court explained in *Elstad*, when the primary illegality at issue is an inadvertent *Miranda* violation alone, the subsequent administration of *Miranda* warnings prior to a second confession adequately ensures the voluntariness of that statement. *See* 470 U.S. at 310-311, 314. For purposes of the Sixth Amendment, however, the assistance of counsel ensures "equality in [the] adversary confrontation" by protecting the accused from his own "lack of familiarity with the law." *Ash*, 413 U.S. at 317. Counsel is important not simply to advise a defendant that he is not compelled to speak, but also to advise the defendant whether it is in his best interest, in light of the charges against him, to speak or remain silent. Thus, regardless whether counsel serves a similar role under the Fifth and Sixth Amendments at ordinary pretrial interrogations, as the court of appeals found based on *Patterson* (App. 8a-9a), counsel serves a broader Sixth Amendment interest in those circumstances where government officers have previously and unlawfully elicited incriminating information from a defendant. *Elstad*'s conclusion that *Miranda* warnings themselves can adequately safeguard the values protected by the Fifth Amendment does not translate to the Sixth Amendment context.

3. Having extended *Elstad* to petitioner's case, the court of appeals did not apply the traditional derivative-evidence rule. That failure had an important effect. As petitioner argued previously to this Court, his jailhouse confession should have been suppressed under that rule. *See, e.g.*, Brief for Pet., *Fellers* v. *United States*, No. 02-6320, at 26-30, 37-41.

Under the derivative-evidence rule, the government bears the burden of proving that "the connection between the lawless conduct of the police and the discovery of the challenged evidence ha[d] 'become so attenuated as to dissipate the taint' " of the prior constitutional violation. *Wong Sun* v. *United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)); *see also, e.g.*,

Kaupp v. *Texas*, 538 U.S. 626, 632-633 (2003) (*per curiam*). When the derivative evidence is a defendant's incriminating statement, this Court has framed the inquiry as whether that statement was " 'sufficiently an act of free will to purge the primary taint.' " *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

"Free will," as used in the Court's derivative-evidence cases, means more than simply constitutional voluntariness (*i.e.*, absence of government coercion). It means a true break in the chain of causation establishing that the unconstitutional conduct did not influence the defendant to give the statement in question. A reviewing court must be convinced that the prior constitutional violation did "not play any meaningful part in the witness' willingness" to make an inculpatory statement. *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978).

This Court has recognized that *Miranda* warnings by themselves may well be insufficient to break the chain of causation from a constitutional violation. For example, when the government obtains a confession from a defendant following an illegal arrest, this Court's cases "firmly establish[] that the fact that the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of an illegal arrest." *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982); *see also Brown*, 422 U.S. at 602 ("In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' " (quoting *Wong Sun*, 371 U.S. at 486)).

To determine whether the chain of causation from a constitutional violation has been broken, this Court has applied a multifactor attenuation test. Courts must consider, in addition to the presence of any *Miranda* warnings, the temporal proximity between the constitutional violation and the defendant's incriminating statement, the presence or

absence of intervening circumstances, and, particularly, the purpose and flagrancy of the violation. *See Kaupp*, 538 U.S. at 633; *Taylor*, 457 U.S. at 690; *Dunaway* v. *New York*, 442 U.S. 200, 218 (1979); *Brown*, 422 U.S. at 603-604. Given the clear force of the evidence in petitioner's case, the government cannot satisfy its burden to prove taint attenuation.

First, only a half-hour passed between the deliberate elicitation of the first statement from petitioner at his home and his subsequent confession at the jail. During this entire period, petitioner remained in the custody of the police officers. The exceedingly brief time period in petitioner's case is shorter than cases where the Court has found the temporal factor to favor exclusion of a subsequent confession. *See, e.g.*, *Taylor*, 457 U.S. at 691 (1982) (six hours); *Brown*, 422 U.S. at 604 (under two hours).

Second, no meaningful intervening event took place between the officers' confrontation of petitioner at his home and the subsequent interrogation at the jailhouse. Of particular importance here, given the Sixth Amendment context, is the fact that petitioner never consulted with counsel between the making of the two statements. Petitioner thus remained ignorant of his legal rights (including his right to suppress the first confession). There also was no other intervening circumstance (*e.g.*, an arraignment before a judge at which counsel was appointed) that "could possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691; *cf. Brown*, 422 U.S. at 611 (Powell, J., concurring in part) ("some demonstrably effective break . . ., such as actual consultation with counsel or . . . presentation before a magistrate," should be required to attenuate taint of official conduct that is flagrantly abusive of constitutional rights).

Third, the flagrancy of the official misconduct is important. In *Massiah* and subsequent cases, this Court has set forth a clear and easily understood Sixth Amendment standard. As this Court earlier held in a unanimous decision, Deputy Bliemeister plainly violated that Sixth Amendment

standard, telling petitioner that he and his partner wanted to discuss with petitioner the controlled substances charges on which he had been indicted the previous day. *See* App. 21a.

The only factor supporting the government here is the police officers' administration of *Miranda* warnings prior to the jailhouse interrogation. In this respect, the case is similar to the Court's *per curiam* decision in *Kaupp*, where the Court explained: "The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always ... break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.'" 538 U.S. at 633 (quoting *Brown*, 422 U.S. at 603). Indeed, in *Brown*, *Dunaway*, and *Taylor* too, the Court held that confessions were inadmissible despite the administration of *Miranda* warnings. There is no reason that the provision of the warnings here, especially considering the ineffectiveness of such warnings in addressing the central concerns of the Sixth Amendment, should take petitioner's case outside the rationale of these decisions.

4. As the above analysis shows, application of the traditional derivative-evidence rule would require the suppression of petitioner's second statement. The court of appeals' error in departing from that traditional rule in favor of reliance on the inapposite decision in *Elstad* is a serious one that warrants review by this Court. If provision of *Miranda* warnings following a clear Sixth Amendment violation, such as occurred in this case, will be sufficient to eliminate any taint from that violation, then engaging in such violations will essentially become cost-free to the police.

As the Court has recognized in the Fourth Amendment context, a blanket rule that *Miranda* warnings are sufficient to break the link between unconstitutional conduct and a subsequent confession "eviscerate[s]" any incentive for government officers to avoid the improper conduct in the first instance, "making the warnings, in effect, a 'cure-all.'"

Brown, 422 U.S. at 602. That conclusion is even more apt with respect to the Sixth Amendment. To admit a deliberately elicited, uncounseled, post-indictment statement against the defendant at trial in cases involving *no* preceding Sixth Amendment violation, the prosecution already must show that a defendant waived his right to counsel and made his statement voluntarily. *See, e.g.*, *Patterson*, 487 U.S. at 292 (waiver); *Dickerson*, 530 U.S. at 434 (voluntariness). Under the court of appeals' ruling, however, the very same showing would be sufficient to establish the admissibility of a confession derived from an earlier Sixth Amendment violation. In the court of appeals' view, therefore, nothing at all is changed by the fact that the government has violated the Constitution. That approach is insufficient to protect the important interests safeguarded by the Sixth Amendment.

II. THE COURT OF APPEALS' HARMLESS-ERROR HOLDING WARRANTS REVIEW BECAUSE IT CONTRAVENES WELL-ESTABLISHED PRECEDENT OF THIS COURT

The court of appeals held in the alternative that any error in petitioner's case was harmless. That ruling also warrants review by this Court. This Court's cases make clear the proper standard for harmless-error review. More than 35 years ago, this Court held in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), that a constitutional error in a criminal case may be treated as harmless only where it can be said "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The Court continues to apply the same *Chapman* standard today for direct review of constitutional errors. *See, e.g.*, *Neder* v. *United States*, 527 U.S. 1, 15 (1999) ("In *Chapman* v. *California*, we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (citation omitted)).

The court of appeals did not apply the *Chapman* standard. On appeal, petitioner argued that the admission of his jailhouse confession could not have been harmless given the substantial reliance the government placed on petitioner's

statement to corroborate and support the testimony of its severely credibility-challenged witnesses. *See* Supp. Br. of Def.-Appellant at 21-24. The court of appeals did not disagree that petitioner's statement had such a corroborative effect. Indeed, the court described the same effect itself. *See* App. 13a. Nevertheless, the court did not once conduct the inquiry prescribed by *Chapman* and make a determination whether the admission of petitioner's jailhouse confession (and the particular manner in which the government put it to use) contributed to the jury verdict by providing important corroborative support to the government's otherwise weak case.

Rather, relying on prior cases adjudicating defendants' challenges to the sufficiency of the evidence supporting their convictions, the court of appeals replaced the *Chapman* standard with the different and more government-favorable evidence-sufficiency standard:

> Although "a reasonable mind could entertain concerns about the 'reliability and consistency of [the government witnesses'] accounts' " given the witnesses' plea bargains, criminal histories, and past drug use, *the evidence presented by the government in this case is sufficient to prove that [petitioner] conspired to possess methamphetamine with intent to distribute. Accordingly, any error in admitting [petitioner's] jailhouse statements was harmless.*

App. 13a-14a (emphasis added) (quoting *United States* v. *Aguilar-Portillo*, 334 F.3d 744, 747 (8th Cir. 2003)).

This analysis was legally erroneous. Long ago, in *Kotteakos* v. *United States*, this Court explained that the harmless-error "inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." 328 U.S. 750, 765 (1946); *see also id.* at 767 ("The Government's theory seems to be . . . that the error . . . is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a

separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under [the federal harmless error statute].”). More recently, in *Satterwhite* v. *Texas*, 486 U.S. 249, 258-259 (1988), the Court distinguished constitutional harmless-error review from sufficiency-of-the-evidence review in clear and certain terms: “The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” (quoting *Chapman*, 386 U.S. at 24).

In contrast to the decision below, other courts of appeals have followed this Court’s clear instructions that harmless-error review is not equivalent to sufficiency-of-the evidence review. *See, e.g.*, *United States* v. *Hands*, 184 F.3d 1322, 1329 (“An error may substantially influence an outcome and thus warrant reversal even if the evidence, had no error occurred, would have been sufficient to support the conviction.”), *corrected in other respects by* 194 F.3d 1186 (11th Cir. 1999); *United States* v. *Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998) (“[H]armless error review calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict.”); *United States* v. *Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995) (“The question is not whether, omitting the inadmissible statements, the record contains sufficient evidence for a jury to convict the defendant.”).

Had the court of appeals applied the correct *Chapman* standard, it could not have found the admission of petitioner’s jailhouse confession to be harmless. As noted (*supra*, at pp. 5-7), the government’s witnesses had severe credibility problems. Contrary to the court of appeals’ erroneous observation that the government witnesses’ testimony “went largely unchallenged” (App. 13a), petitioner’s counsel seized on the witnesses’ lack of credibility in cross-

examining each witness. Petitioner's counsel also focused his closing argument on the credibility issue, contending that the government witnesses' testimony should be disbelieved in its entirety. *See* TT 711-727. In response, in its closing argument, the government specifically relied on petitioner's jailhouse confession to support its witnesses, describing how "[petitioner's] own statements corroborate the testimony that has been presented by the other witnesses who have been brought in for you." TT 734; *see also* TT 704, 732-734. Yet, even with the erroneous admission of petitioner's jailhouse confession and the government's corroboration argument, petitioner's credibility argument clearly had an effect on the jury, which chose not to fully credit the government's witnesses. Although the government argued that the testimony of its witnesses made petitioner responsible for between 691 to 815 grams of methamphetamine (*see* TT 710), the jury found only between 50 and 500 grams involved in petitioner's offense (*see* TT 739).

In these circumstances, it is impossible to say that the admission of petitioner's jailhouse confession was harmless. As this Court has noted, "[a] confession is like no other evidence. The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) (internal quotation marks omitted). Absent petitioner's confession and its corroborative effect on the government witnesses' testimony, the jury might have discredited the government witnesses entirely. In similar circumstances in *Fulminante*, this Court found that the erroneous admission of the respondent's coerced confession could not have been harmless when the jury might have credited other evidence due to the improperly admitted confession. *See id.* at 1258-1259; *see also United States* v. *Noti*, 731 F.2d 610, 615-616 (9th Cir. 1984) (holding error not harmless where credibility of government witness was in dispute, yet jury likely credited witness in part due to corroboration by defendant's erroneously admitted statements). Moreover, petitioner's jailhouse statement was particularly damaging,

given that the government had charged him with conspiracy to possess with intent to distribute and petitioner admitted both his association with the alleged co-conspirators and having purchased methamphetamine from them.

The decision below reflects a basic misunderstanding about the nature of harmless-error review. That misunderstanding had a direct real impact on the outcome of the case. Accordingly, this Court should grant review to make clear that harmless-error review and sufficiency-of-the-evidence review are distinct and must remain so.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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